NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-260

	Opinion Delivered November 12, 2008
AARON DWAIN SMITH APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CR-06-601-IV]
V.	HONORABLE MARCIA R. HEARNSBERGER, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Chief Judge

A jury found appellant guilty of being a felon in possession of a firearm, and he was sentenced as a habitual offender to thirty-five years' imprisonment. On appeal, he argues that the evidence is insufficient to support his conviction, that the trial court erred in refusing to reduce the charge to a Class D felony, that the trial court erred by ordering his attorney not to argue to the jury that the State had failed to prove that he had knowledge of the firearm, and that the trial court erred in denying his motion to suppress. We reverse and remand.

Because preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors, *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first address appellant's sufficiency argument. When the sufficiency of the evidence is challenged on appeal, the test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). In determining whether the evidence is substantial, we view the evidence in the light most

favorable to the State, considering only the proof that supports the verdict. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In making this review, we consider all of the evidence favorable to the verdict that was introduced at trial, including any evidence that we may subsequently determine to have been improperly admitted. *Hardrick v. State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994).

Here, there was evidence that a Hot Springs police officer assigned to patrol the Housing Authority grounds saw appellant on the Housing Authority premises on September 16, 2006. The officer had personal knowledge that appellant had been banned from the premises. The officer approached appellant, who was standing next to the driver's door of his truck, and asked for identification. A warrant check showed that appellant had an outstanding arrest warrant for failure to appear. Appellant was then placed under arrest for criminal trespass and confined to the back seat of the officer's patrol car. The arresting officer then asked appellant if he was a convicted felon. Appellant said, "Yes." The arresting officer then walked away from the patrol car toward appellant's truck Two other officers arrived and searched appellant's truck, which was parked on Housing Authority premises, and found a firearm under the driver's seat. The arresting officer then entered the patrol car and began driving appellant to the police station for processing. As he was doing so, approximately six minutes after the arresting officer had asked appellant if he was a convicted felon, appellant spontaneously stated, "I carry that pistol because some people are trying to kill me."

Arkansas Code Annotated section 5-73-103(a)(1) (Repl. 2005) prohibits possession of firearms by persons who have been convicted of a felony. Appellant concedes that he was a felon at the time of the incident and argues only that the evidence is insufficient to show that he knowingly possessed the firearm. However, appellant's argument completely ignores the evidence that he spontaneously told the arresting officer that he had the pistol for self-defense from people who were trying to kill him. Whether admitted rightfully or wrongfully, this evidence must be considered in determining the sufficiency of the evidence pursuant to *Harris v. State*, *supra*. *See Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1993). When evidence of appellant's statement is considered, the evidence is quite clearly sufficient to support a finding that he knowingly possessed the firearm.

Appellant next argues that the trial court erred in refusing to reduce the felon-in-possession charge from a Class B felony to a Class D felony. Possession of a firearm by a felon is a Class D felony unless the firearm was being used in a crime, the defendant had a prior violent felony conviction, or the defendant had previously been convicted of being a felon in possession of a firearm, in which case the offense is a Class B felony. Ark. Code Ann. § 5-73-103(c) (Repl. 2005). Here, appellant argues that a facsimile copy of a sentencing order showing that he had previously been convicted of felon in possession of a firearm was erroneously admitted and that, in any event, it does not constitute substantial evidence to show that he was the person convicted because it does not contain his Social Security number or other identification other than his name. We find no error. Arkansas Code Annotated section 5-4-504(a) (Repl. 2006) provides that, for the purpose of showing habitual-offender

status, "[a] previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty." It has been held that this provision indicates the clear intent of the legislature to permit proof of prior convictions by means other than those expressly listed elsewhere in the statute, *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997), and, although the lack of a Social Security number or other identification other than appellant's name goes to the weight of the evidence, it cannot be said that the sentencing order introduced in this case was legally insufficient to support a finding of a prior conviction.

Appellant further argues that his statement that he possessed the firearm must be suppressed because he was in custody at the time it was made. Statements arising from custodial interrogation are presumed to be involuntary. The burden is thus on the State to prove that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to an attorney, and that he voluntarily made the statement. *Scales v. State*, 37 Ark. App. 68, 824 S.W.2d 400 (1992). On appeal from the denial of a motion to suppress, we make an independent review based on the totality of the circumstances, but we defer to the trial court's superior position to determine the credibility of the witnesses who testify to the circumstances of a defendant's custodial statement, and we will not reverse the trial court's findings of historical fact unless they are found to be clearly erroneous. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003); *Brunson v. State*, 41 Ark. App. 39, 848 S.W.2d 936 (1993); *see Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Appellant asserts that his statement regarding the firearm was the result of custodial interrogation because the arresting officer had previously asked him if he was a felon. We do not agree. Viewing the record in its entirety and giving due deference to the trial court's superior position to assess credibility, it appears that the question regarding felony status was the only instance of interrogation, and that several minutes passed between that question and appellant's statement that he kept the firearm for protection. Viewed in this light, we think the trial judge did not err in finding that the statement was spontaneous:

> A spontaneous statement is admissible because it is not compelled or the result of coercion under the Fifth Amendment's privilege against self-incrimination. *Arnett* [*v. State*,], 353 Ark. 165, 122 S.W.3d 484 [(2003)]; *Fairchild* [*v. State*,], 349 Ark. 147, 76 S.W.3d 884 [(2002)]. In determining whether a statement is spontaneous, we focus on whether the statement was made in the context of a police interrogation, meaning direct or indirect questioning put to the accused by the police with the purpose of eliciting a statement from him.

State v. Pittman, 360 Ark. 273, 276, 200 S.W.3d 893, 896 (2005).

We do, however, find merit in appellant's argument that the trial court erred in refusing to allow his attorney to argue that appellant's knowledge of the presence of the weapon was an essential element of the offense. It is clear from the record that the trial judge ruled that possession of a firearm by a felon was a strict-liability offense requiring no knowledge that a weapon was present, and that the judge not only forbade appellant from arguing lack of knowledge but also permitted the State to argue affirmatively in closing that evidence of appellant's knowledge was not required for a finding of guilt. To do so was error. Possession of a firearm by a felon is not a strict-liability offense; instead, it must be shown that

the firearm was possessed purposely, knowingly, or recklessly. Ark. Code Ann. §§ 5-2-203 and 204 (Repl. 2006); *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986). We think that the error tainted the jury verdict and deprived appellant of a fair trial, and we therefore reverse on this point and remand.

Reversed and remanded.

BAKER and HUNT, JJ., agree.